

IN THE SUPREME COURT OF THE STATE OF DELAWARE

USHANGO OWENS,	§
	§ No. 676, 2009
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0702007817
	§
Plaintiff Below-	§
Appellee.	§

Submitted: July 22, 2011

Decided: August 25, 2011

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 25th day of August 2011, upon consideration of the Superior Court's report following remand, the parties' supplemental memoranda and the record below, it appears to the Court that:

(1) The defendant-appellant, Ushango Owens, filed an appeal from the Superior Court's October 22, 2009 order adopting the Commissioner's August 19, 2009 report, which recommended that Owens' first motion for postconviction relief pursuant to Superior Court Criminal Rule 61 be summarily dismissed.¹ By Order dated May 27, 2010, this Court remanded

¹ Del. Code Ann. tit. 10, §512(b); Super. Ct. Crim. R. 62.

the matter to the Superior Court for further proceedings.² Owens has now appealed from the Superior Court's December 7, 2010 order adopting the Commissioner's November 8, 2010 report, which recommended that Owens' motion be denied.³ We find no basis for the appeal. Accordingly, we affirm.

(2) The record before us reflects that, in August 2007, a Superior Court jury found Owens guilty of Possession With Intent to Deliver Heroin, Delivery of Heroin Within 300 Feet of a Park, Possession of Heroin Within 1000 Feet of a School and Resisting Arrest. He was sentenced to a total of 10 years of Level V incarceration, to be suspended after 5 years for 1 year of Level III probation. Owens did not file a direct appeal of his convictions. In November 2007, he filed a motion for modification of sentence, which the Superior Court denied. This Court affirmed the Superior Court's judgment by Order dated October 8, 2008.

(3) The claims made by Owens in his original appeal and in his supplemental memorandum following remand may fairly be summarized as follows: a) his trial attorney provided ineffective assistance of counsel by

² Because the Superior Court did not request Owens' counsel to submit an affidavit responding to Owens' claims of ineffective assistance of counsel, the Court concluded that the record was insufficient to review Owens' appeal from the dismissal of his first postconviction motion. *Horne v. State*, 887 A.2d 973, 975 (Del. 2005).

³ The affidavit of Owens' trial counsel was requested, and considered, by the Superior Court. The record reflects that, despite being given an opportunity to do so, Owens failed to dispute his attorney's affidavit.

failing to i) file the appropriate pre-trial motions, ii) conduct a reasonable investigation of the facts, iii) properly conduct trial, and iv) file a direct appeal; and b) the Superior Court improperly failed to find that the ineffectiveness of his counsel overcame the time and procedural bars of Rule 61. To the extent that Owens has failed to present claims raised previously in the Superior Court, those claims are deemed to be waived and will not be considered by this Court.⁴

(4) When deciding a motion for postconviction relief, the Superior Court must first determine whether the defendant has met the procedural requirements of Rule 61 before considering the merits of his claims.⁵ In this case, the Superior Court properly determined that Owens' postconviction claims were time-barred under Rule 61(i) (1). In response, Owens alleges that his counsel provided ineffective assistance, thereby attempting to overcome the time bar by demonstrating a miscarriage of justice under Rule 61(i) (5).

(5) In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of

⁴ *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

⁵ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

the proceedings would have been different.⁶ Although not insurmountable, the Strickland standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.⁷ The defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.⁸

(6) The record reflects that the evidence presented against Owens at trial was particularly compelling. Owens was filmed making drug sales on the street. Also, when fleeing from the police, Owens was observed throwing contraband under a car, which was recovered by the police. Finally, contraband was found on Owens' person following his arrest. As such, the record does not support Owens' conclusory claims of prejudice due to alleged negligence on the part of his counsel prior to and at trial.

(7) As for Owens' claim that his counsel was ineffective for failing to file a direct appeal, the record reflects that, if the State had chosen to file a habitual offender motion under Del. Code Ann. tit. 11, §4214(b), Owens would have been subject to a life sentence. However, Owens, in consultation with his counsel, agreed not to appeal his sentence in exchange for the State's recommendation of only 7 years at Level V, to be followed by

⁶ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁷ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

⁸ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

Level IV, under Del. Code Ann. tit. 11, §4214(a). Because there is no factual support for Owens' claim that his attorney's failure to file a direct appeal was the result of professional negligence, that claim, too, is unavailing.

(8) Moreover, because there is no factual support for any of Owens' claims of ineffective assistance of counsel, there is, likewise, no basis for Owens' claim that his attorney's ineffectiveness amounted to a miscarriage of justice that would overcome the time bar of Rule 61(i) (1). For all of the above reasons, the Superior Court's denial of Owens' postconviction motion must be affirmed.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice